

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NEW YORK PAVING, INC.

and

Case 29-CA-254799

CONSTRUCTION COUNCIL LOCAL 175,
UTILITY WORKERS UNION OF AMERICA,
AFL-CIO

ORDER

On July 27, 2020, Administrative Law Judge (“ALJ”) Lauren Esposito issued an Order requiring that the hearing in the above-captioned case be conducted by videoconference, finding that the current Coronavirus Disease (COVID-19) pandemic constitutes “compelling circumstances” warranting a remote hearing via videoconference. Thereafter, in accordance with Section 102.26 of the Board’s Rules and Regulations, the Respondent filed the instant request for special permission to appeal the judge’s Order. The General Counsel filed a response opposing the motion.

Having duly considered the matter, we grant the Respondent’s request for permission to file a special appeal, but we deny the appeal on the merits.¹ For the reasons discussed below, and as set forth more fully in *William Beaumont Hospital*, 370 NLRB No. 9 (2020), we find that the Respondent has failed to establish that conducting the hearing via videoconference would deny it due process.

The Respondent argues that a videoconference hearing is not permitted under Section 102.35(c) of the Board’s Rules and Regulations and that such a hearing would be without all of

¹ The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

the safeguards required by that Section and thus deny it due process. The Board has found that the ongoing COVID-19 pandemic establishes good cause based on compelling circumstances for taking video testimony under Section 102.35(c). *William Beaumont Hospital*, 370 NLRB No. 9, slip op. at 1; *Morrison Healthcare*, 369 NLRB No. 76, slip op. at 1 (2020). Moreover, we have found that because Section 102.35(c) pertains to hearings in which a single witness testifies via video conference in an otherwise in-person hearing, the strictures of that Section are informative but not controlling when a hearing is conducted entirely by videoconference. *William Beaumont Hospital*, 370 NLRB No. 9, slip op. at 1; *Morrison Healthcare*, 369 NLRB No. 76, slip op. at 1 fn. 2. A video hearing can also provide for the observation of witnesses for the purpose of credibility determinations, as well as adequately address other due process and procedural concerns. *EF International Language Schools, Inc.*, 363 NLRB No. 20, slip op. at 1 fn. 1 (2015), enfd. 673 Fed. Appx. 1 (D.C. Cir. 2017); *XPO Cartage, Inc.*, 370 NLRB No. 10 (2020). Therefore, we find that the Respondent's speculative concerns are premature and may be raised with the judge in the first instance if warranted, or on exceptions to the Board pursuant to Section 102.46 of the Board's Rules and Regulations, in the event it receives an adverse ruling. Under these circumstances, we find that the Respondent has failed to demonstrate that the judge abused her discretion.

Dated, Washington, D.C., October 8, 2020.

Marvin E. Kaplan	Member
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William J. Emanuel	Member
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Lauren McFerran	Member
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(SEAL)

NATIONAL LABOR RELATIONS BOARD